Supreme Court, U.S.
FILED
D41425 FEB 23 1995
No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JERALD DAVIS,

Petitioner,

vs.

UNION NATIONAL BANK, a national banking association and the successor in interest to the First National Bank of Macomb, a wholly owned subsidiary of Union National Bank, THE FIRST NATIONAL BANK OF MACOMB, a corporation, and predecessor in interest to the Union National Bank,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To establish private party state action necessary to a constitutional violation for a malicious and selective prosecution redressable under 42 U.S.C. §1983, is it necessary to plead and prove that the absolutely and qualifiedly immune state actors conspired with the private party in the sense of agreeing with the latter's unconstitutional objective?

2. Whether a conspiracy is necessary or not, can the §1983 plaintiff survive summary judgment by showing the private §1983 defendant induced "extensive use of state procedures with 'the overt significant assistance of state officials' " by misrepresentations and omissions made for the purpose of causing a malicious prosecution in order to secure for itself preferential treatment under state law at the expense of the §1983 plaintiff?

PARTIES IN THE COURT BELOW

Petitioner, Jerald Davis, was the Plaintiff-Appellant in the court below. Respondent Union National Bank, a national banking association and the successor in interest to the First National Bank of Macomb, a wholly owned subsidiary of Union National Bank, was the Defendant-Appellee in the court below.

RULE 29.1 STATEMENT

Respondent Union National Bank is a corporation which, in turn, is wholly owned by Sturm Investment Company, Inc., located in Lincoln, Nebraska.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES IN THE COURT BELOW ii

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT:

A. The Decision Below, Requiring a Conspiracy Between the Private Party and the State Actors to Establish the Former's Liability for a Constitutional Violation for Malicious Prosecution Under 42 U.S.C. §1983, is in Direct Conflict With This Court's Private Party State Action Precedents .. 9

B. The Decision Below is Without Explicit Support in Any Circuit Notwithstanding Conflicting Results in the Circuits on the Important and Recurring Question as to the Test for Private Party State Action Under §1983 in a Malicious Prosecution Setting 17

C. The Decision Below is in Direct Conflict With the Private Party State Action Jurisprudence of the New York Court of Appeals 19

TABLE OF CONTENTS – Continued

Page

D. The Seventh Circuit Has Decided an Important Question of Federal Law Which Has Not Been Settled By This Court, Will Certainly Recur, and, Therefore, Should be Settled By This Court 21

CONCLUSION 22

APPENDIX A 1a

APPENDIX B 6a

APPENDIX C 19a

APPENDIX D 20a

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress & Company, 398 U.S. 144 (1970) ..... *passim*

Ah Sin v. Wittman, 198 U.S. 500 (1905) 19

Albright v. Oliver, ___ U.S. ___, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) 14, 21

Brinegar v. United States, 338 U.S. 160 (1949) 13

Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991) 17

Brummett v. Campbell, No. 94-958, cert. denied, 63 LW 3538 (1995) 17

Butler v. Goldblatt Brothers, Inc., 589 F.2d 323 (7th Cir. 1978) 4

Cameron v. Johnson, 390 U.S. 611 (1968) 19

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 4, 18

Cinel v. Connick, 15 F.3d 1388 (5th Cir. 1994) 18, 21

Davis v. Owens, 973 F.2d 574 (7th Cir. 1992) 3

Dennis v. Sparks, 449 U.S. 24 (1980) 10

Edelman v. California, 344 U.S. 357 (1953) 19

Edmonson v. Leesville Concrete Company, Inc., 500 U.S. ___, 114 L.Ed.2d 660 (1991) 11, 12, 13, 15, 19

Felix De Santana v. Velez, 956 F.2d 16 (1st Cir. 1992) 15, 17

Gramenos v. Jewel Company, Inc., 797 F.2d 432 (7th Cir. 1986) 4

Hand v. Gary, 838 F.2d 420 (5th Cir. 1988) 17

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 15

TABLE OF AUTHORITIES – Continued

Page

Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1989) 15

Kirby v. Illinois, 406 U.S. 682 (1972) 13

Lee v. Town of Estes Park, 820 F.2d 1112 (10th Cir. 1987) 18

Lugar v. Edmondson Oil Company, 457 U.S. 922 (1981) ..... *passim*

Malley v. Briggs, 475 U.S. 335 (1986) 15

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 14

Moore v. Market Place Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985) 4, 17

Morrison v. California, 291 U.S. 82 (1934) 10

Motes v. Myers, 810 F.2d 1055 (11th Cir. 1987) 17, 18

NCAA v. Tarkanian, 488 U.S. 179 (1988) 11

Oyler v. Boles, 368 U.S. 448 (1962) 19

People v. Acme Markets, Inc., 372 N.Y.S.2d 590 (N.Y. Ct. App. 1975) 19, 20

People v. Davis, 189 Ill.App.3d 815 (3d Dist. 1989) ...8, 9

San Francisco Arts and Athletics, Inc. v. United States Olympic Commission, 483 U.S. 522 (1987) 11

Schilb v. Kubel, 404 U.S. 357 (1971) 7

Snowden v. Hughes, 321 U.S. 1 (1944) 19

Speiser v. Randall, 357 U.S. 513 (1958) 14

Strength v. Hubert, 854 F.2d 421 (11th Cir. 1988) 17

303 W. 42nd St. Corp. v. Klein, 416 N.Y.S.2d 219 (N.Y. Ct. App. 1979) 20

Tower v. Glover, 467 U.S. 914 (1984) 10

TABLE OF AUTHORITIES – Continued

Page

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) 11, 12, 16, 19

Two Guys v. McGinley, 366 U.S. 582 (1961) 19

West v. Atkins, 487 U.S. 42 (1988) 11, 19

Wyatt v. Cole, 504 U.S. ___, 118 L.Ed.2d 504 (1992) 11, 13, 15

Wyatt v. Cole, 994 F.2d 1113 (5th Cir. 1993) 15

Yick Wo v. Hopkins, 188 U.S. 356 (1886) 14, 19

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) 14

CONSTITUTION

United States Constitution, Amendment IV 2, 20

United States Constitution, Amendment XIV, §1 2

STATUTES

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 4

28 U.S.C. §1343 4

42 U.S.C. §1983 ..... *passim*

215 ILCS 5/155.58 8

725 ILCS 5/110-7(a) 7

725 ILCS 5/110-7(f) 7

725 ILCS 5/110-10(a)(3) 7

760 ILCS 65/0.01 8

TABLE OF AUTHORITIES – Continued

Page

810 ILCS 5/4-210(a) 6
810 ILCS 5/4-210(b) 6
815 ILCS 405/11 8

No. _____

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JERALD DAVIS,

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vs.

UNION NATIONAL BANK, a national banking association and the successor in interest to the First National Bank of Macomb, a wholly owned subsidiary of Union National Bank, THE FIRST NATIONAL BANK OF MACOMB, a corporation, and predecessor in interest to the Union National Bank,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jerald Davis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming summary judgment for the Respondents by the United States District Court for the Central District of Illinois, Peoria Division, (Mihm, C.J.).

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-5a) is not yet reported. The opinion and order of the district court (Mihm, C.J.) (App. B, *infra*, 6a-18a), is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 19a), was entered December 28, 1994. This Petition for Certiorari is being brought within 90 days of that judgment as Petitioner did not seek rehearing in the court of appeals. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

A. United States Constitution, Amendment IV.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. United States Constitution, Amendment XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall

make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

C. 42 U.S.C. §1983.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

STATEMENT OF THE CASE

Petitioner sued Respondent Union National Bank of Macomb, Illinois, under 42 U.S.C. §1983.[1] He alleged a deprivation of liberty secured by the probable cause standard of the Fourth and Fourteenth Amendments and a denial of equal protection of the laws secured by the Fourteenth Amendment. His allegations derived from his baseless prosecution on twenty-six felonies instigated by

[1] He originally also sued William Owens, an Illinois State Police Department of Criminal Investigation officer, who was the case agent. Owens was dismissed on qualified immunity grounds. See *Davis v. Owens*, 973 F.2d 574 (7th Cir. 1992).

the bank. Petitioner invoked the district court's jurisdiction under 28 U.S.C. §§1331 and 1343.

The district court granted the bank's motion for summary judgment. It concluded that Petitioner had not shown a conspiracy between the bank and the state prosecutorial officials. The court of appeals affirmed. The court of appeals, noting that this Court "has not established a test for finding state action in a malicious prosecution case", App. A, 3a, held that "[t]he private actor must wrongfully influence the state's decision to prosecute through a conspiracy, or else the plaintiff must seek his remedy in a state tort claim, not a federal §1983 suit." App. A, 4a.[2]

The summary judgment record[3] showed that Petitioner was an independent insurance broker who had a

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[2] The court of appeals relied exclusively on its own precedents, *Gramenos v. Jewel Company, Inc.*, 797 F.2d 432 (7th Cir. 1986); *Moore v. Market Place Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985); *Butler v. Goldblatt Brothers, Inc.*, 589 F.2d 323 (7th Cir. 1978). The lower court explained that "although private parties call on the aid of state law 'without the grounds to do so', when the private decision may 'in no way be attributed to a state rule or decision', . . . the private parties are not state actors. . . . " *Gramenos, supra*, 797 F.2d at 435-36, App. A, 4a.

[3] For purposes of the first issue presented for review, the summary judgment record as recited in the Seventh Circuit's opinion is adequate. Respecting, however, the second issue, the Seventh Circuit's opinion reciting only that "one of the state officials eventually applied for and received a loan from the bank", App. A, 4a, is deficient. That description of the record reflects the least significant aspect of the relationship between the bank and the state officials from which Petitioner asserted a conspiracy under *Adickes v. S.H. Kress & Company*, 398 U.S. 144 (1970), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Petitioner has added to the court of appeals' recitation of the summary

contractual relationship with the Union National Bank's wholly owned subsidiary, The First National Bank of Macomb, Illinois, to provide "overline" (higher risk) credit life insurance for the bank's consumer loan customers. The bank solicited the purchase and sale of credit life from the customers. When a borrower agreed to purchase credit life, the premium was added to the loan amount and the bank, after taking one-third of the premium as its fee, would deposit the remainder in Petitioner's escrow account. It would then notify Petitioner that he was to procure credit life for the customer and would specify the necessary information such as the amount, duration, and interest rate of the loan and the loan customer's name, age, etc.

In 1985, bank officials discovered thirteen instances where consumers paid premiums for credit life insurance but did not receive the insurance. After determining only that money had been placed by one of the bank loan officers into the escrow account maintained by Petitioner for purposes of the insurance and no insurance was produced, the bank president, senior vice president and lawyer took the matter to the McDonough County, Illinois State's Attorney William Poncin who contacted state police official Owens to conduct an investigation. The prosecutors perceived the purpose of the bank's bringing information to them was "to get something done", CA. 139, and the effect of the bank's action on the prosecutors

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judgment record by making specific reference to his appendix in the court of appeals by the designation "CA" and the page number.

was that it "got the ball rolling." CA. 178. Owens conducted his investigation primarily by inquiring of the bank officials as to the relevant circumstances.

Those officials withheld from Poncin and Owens the fact that the bank loan officers never notified Petitioner, contrary to bank policy, to procure credit life insurance for the thirteen loan customers in question. Accordingly, the officials did not advise that Petitioner never received the information necessary to procure credit life. The officials did not advise that the bank's relationship with Petitioner was a contractual one. They did not advise that it was the bank, not Petitioner, which had solicited the purchase and sale of the credit life. The officials also withheld information that the bank officers, and not Petitioner, had, deducted, or "set off" the money deposited into Petitioner's escrow account for purpose of the credit life premiums to pay down on Petitioner's unrelated defaulted real estate loans.[4]

State's Attorney Poncin admitted that had the bank advised of its failure to notify Petitioner to procure credit life and of the information necessary to do so he might not have prosecuted. CA. 1250-1253. Investigator Owens also admitted that had the bank officials advised that the bank had not notified Petitioner to produce the credit life nor provided him the information necessary to do so, he might not have considered Petitioner criminally culpable. CA. 998-999.

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[4] See generally 810 ILCS 5/4-210(a) and (b) giving banks a security interest in depository accounts to secure obligations of the depositor. The state prosecutor sought and secured the immunity of the two bank loan officers who had been responsible for soliciting the purchase and sale of credit life. CA. 1103-1104, 1657.

In the prosecution of the state criminal case against Petitioner, the bank paid its lawyer to attend all five days of trial. CA. 749-758, 1195-1199. The bank's lawyer informally assisted the prosecutor with the examination of the witnesses. *Id.* At trial, the prosecutor learned, presumably for the first time, that the bank had set off against the Petitioner's escrow account. CA. 1172-1174. However, he did not depart from his attempt to hold Petitioner criminally liable.

After Petitioner was convicted on four of the twenty-six counts[5], the state prosecutor sought the bank officials' advice before making a sentencing recommendation to the circuit court. The prosecutor recommended and the state court ordered that Petitioner pay $3,100 restitution to cover the extent to which the loan customers lost money as a result of paying for but not receiving credit life insurance. CA. 1201-1206, 1286-1287. That was the

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[5] Twenty-one of the original twenty-six counts were dismissed prior to trial. The Illinois circuit court directed a verdict in Petitioner's favor on another count. Respecting the remaining counts, Petitioner was precluded by a state court order from introducing any evidence other than his own testimony by reason of a violation of a discovery order as explained in the Illinois appellate court's opinion, App. D, 23a-25a, *infra*.

During the pendency of the criminal proceedings, Petitioner was free on $50,000 bail. Pursuant to 725 ILCS 5/110-7(a) and (f), Petitioner executed the bail bond and deposited with the clerk of the court 10% of the bail, or $5,000. Upon his discharge by the appellate court, the circuit court returned to Petitioner $4,500, retaining 10% of the amount deposited as costs. See *Schilb v. Kubel*, 404 U.S. 357 (1971). Additionally, during the pendency of the proceedings against him, Petitioner was, pursuant to 725 ILCS 5/110-10(a)(3), precluded from leaving the state of Illinois without leave of the circuit court.

remainder of the amount for which the bank would have been liable under Illinois law to its loan customers.[6]

After Petitioner's conviction, the state prosecutor advised at least one of the loan customers that upon the "affirmance" of that conviction by the state appellate court, he would enforce Petitioner's court ordered obligation to pay restitution. CA. 1225-1226, 1638-1644. However, after Petitioner's conviction was reversed and Petitioner discharged, the state prosecutor did not advise the loan customers of opportunities they might have to seek legal advice respecting what rights, if any, they had against the bank. *Id.* Last, the prosecutor, after Petitioner's conviction but during pendency of his appeal, sought and secured a loan from the bank for his personal benefit. CA. 1181.

The Illinois appellate court reversed Petitioner's conviction, holding that no crime had been committed and ordered him discharged. App. D, 29a.[7] It held that under Illinois law, by virtue of its solicitation of the purchase

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[6] See 215 ILCS 5/155.58; 760 ILCS 65/0.01; 815 ILCS 405/11. *People v. Davis*, 189 Ill.App.3d 815, 819-820 (3d Dist. 1989), App. D, 28a, *infra*. The bank never made its borrowers whole or otherwise fully credited the accounts of those who paid for but did not receive credit life coverage. CA. 33-34, 81-89, 819-829. The expired terms of all the loans went uninsured and, in most cases, the borrowers unreimbursed. CA. 36-43, 840-846. The bank did purchase some credit life on the unexpired terms of some of the loans, but its officers were angered at having to do so out of bank funds. CA. 79-89.

[7] The Illinois Supreme Court denied the state's petition for leave to appeal, 129 Ill.2d 567, 550 N.E.2d 560 (1990).

and sale of credit life policies, the bank became a fiduciary of its loan customers and that Petitioner, at most, had breached his contractual obligation to the bank to produce the insurance.[8]

The bank had sought to shift to Petitioner both the public perception of liability and the actual legal liability for the bank's obligations to its loan customers for the insurance premiums. CA. 880-886. The bank officials testified they did not attempt to enforce any civil remedies the bank may have had against Petitioner because they feared the bank would suffer adverse publicity. CA. 847-885. The officials also testified they understood Petitioner did not have sufficient funds to cover the losses suffered by the bank's loan customers. *Id.*

REASONS FOR GRANTING THE WRIT

A.

The Decision Below, Requiring a Conspiracy Between the Private Party and the State Actors to Establish the Former's Liability for a Constitutional Violation for Malicious Prosecution Under 42 U.S.C. §1983, is in Direct Conflict With This Court's Private Party State Action Precedents.

In a straightforward but unprecedented opinion, the Seventh Circuit has departed from the test this Court has established for determining when a private party "acts under color of state law" for purposes of 42 U.S.C. §1983. In so doing, the court of appeals has added an element,

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[8] See *People v. Davis, supra*, 189 Ill.App.3d at 819-820, App. D, *infra*, 28a-29a.

conspiracy, requiring, at least in a malicious prosecution setting, that state officials be in agreement with a private party's unlawful objective.[9] That element will insulate private parties who, through misrepresentation and deceit, induce state criminal prosecutions when no probable cause would otherwise exist and for improper purposes such as alleged in this case, to secure preferential treatment under state law at the expense of someone such as Petitioner.

In *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 937 (1981), this Court held that for a private party to be liable as a state actor under 42 U.S.C. §1983, "the conduct allegedly causing the deprivation of a federal right be fairly attributed to the state." Two steps are involved in making the determination of "fair attribution":

> "First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state."

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[9] Generally speaking, a "conspiracy" imports a corrupt agreement between not less than two with guilty knowledge on the part of each. *Morrison v. California*, 291 U.S. 82 (1934). See also *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Tower v. Glover*, 467 U.S. 914, 920 (1984).

Id. That approach has been followed in all this Court's decisions since *Lugar*. See *NCAA v. Tarkanian*, 488 U.S. 179, 182, 194, 199 (1988); *West v. Atkins*, 487 U.S. 42, 49-50 (1988); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486 (1988); *San Francisco Arts and Athletics, Inc. v. United States Olympic Commission*, 483 U.S. 522 (1987); *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 114 L.Ed.2d 660, 673-674 (1991); and *Wyatt v. Cole*, 504 U.S. ___, 118 L.Ed.2d 504, 511-512 (1992).

The court of appeals rejected this Court's foregoing applications of the elements of private party state action. The lower court asserted that in *Lugar* this Court had held that "the test for state action under §1983 will vary by factual context . . . ", App. A, 3a, *infra*. However, in so asserting, the court of appeals overlooked that immediately after citing "a number of different factors or tests in different contexts", *Lugar, supra*, 457 U.S. at 939,[10] this Court acknowledged that such tests might be no more than "different ways of characterizing the necessarily fact bound inquiry that confronts the Court in [the] situation [where a private party is alleged to be clothed with the authority of the state under §1983]". *Id.*

The court of appeals also overlooked that in *Tulsa Professional Collection Services, Inc. v. Pope, supra*, 485 U.S. at 486, this Court held that whether a private party acted under color of state law is determined by whether that party "ma[de] extensive use of state procedures with 'the overt significant assistance of state officials.' " This Court

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[10] The tests enumerated by this Court in *Lugar* included the "public function" test; the "state compulsion" test; the "nexus" test; and the "joint action" test.

followed that analysis in its most recent discussion of private party/state action in *Edmonson v. Leesville Concrete Company, Inc., supra,* 114 L.Ed.2d at 674.[11] Making clear that the "separate tests" summarized in *Lugar* were no more than relevant considerations in the state action inquiry, this Court in *Edmonson v. Leesville, supra,* 114 L.Ed.2d at 674, said that

> "in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine . . . the extent to which the actor relies on governmental assistance and benefits (citations omitted); whether the actor is performing a traditional governmental function (citations omitted); and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."

But, in no case has this Court held or intimated that the test or evidentiary standard for determining whether a private party acts under color of state law is more onerous because it arises in one context as opposed to another. This Court was explicit in *Lugar* that the lower court had erred in concluding that the "participation in joint activity" language of *Adickes v. S.H. Kress & Company,* 398

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[11] In *Tulsa Professional Collection Services, Inc. v. Pope,* this Court found state action where a private party made use of state probate procedures with the legally mandated assistance of the state court to cut off a claim against an estate without notice in violation of the claimant's right to procedural due process. In *Edmonson v. Leesville, supra,* this Court concluded that a private party's use of governmental created preemptory challenges in jury selection enforced by the civil court system likewise constituted private party/state action under the analysis of *Lugar, supra.*

U.S. 144, 152 (1970), "required something more than invoking the aid of state officials to take advantage of state created . . . procedures." *Lugar, supra,* 457 U.S. at 942. And, in *Wyatt v. Cole, supra,* this Court indicated the opposite, at least with respect to a malicious prosecution. *Wyatt v. Cole, supra,* 504 U.S. at ___, 118 L.Ed.2d at 513. However, the extent to which a private party in good faith invokes state procedures and the aid of state officials might provide that party with an affirmative defense, but not an immunity from suit. *Id.*

In requiring that the private party conspire with the public actors in causing a malicious prosecution to bring the former's action under color of law, the lower court added an element which exempts private parties from liability where their conduct is often the most culpable and damaging. Equally important, each of the elements this Court in *Edmonson v. Leesville, supra,* held to be relevant in analyzing the " 'fact bound' " inquiry is present in the private party induced malicious prosecution.

The severest exercise of power by a government over its citizens lies in the initiation and pursuit of a criminal prosecution:

> "The initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice. . . . It is then that a defendant finds himself faced with the prosecutorial forces of organized society. . . . "

Kirby v. Illinois, 406 U.S. 682, 689-90 (1972). The invocation of criminal process puts the interest of the state in "enforcing the law in the community's protection", *Brinegar v. United States,* 338 U.S. 160, 176 (1949), against the

"interest[s] of transcending value . . . a criminal defendant [has in] his liberty", *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958). The commencement of a prosecution "may itself result in significant burdens on a defendant . . . even if he is ultimately vindicated in an adjudication." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). That is because a criminal prosecution brings to bear

> "the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life."

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 814 (1987).

When a private party deceives public officials and causes them to formally institute a baseless criminal prosecution, that party induces an arbitrary and oppressive abuse of governmental power.[12] Thus, as summarized in

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[12] In *Albright v. Oliver*, ___ U.S. ___, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), this Court held that whether a malicious prosecution violated the Constitution must be analyzed under the Fourth Amendment. Petitioner has pleaded a violation of the Fourth Amendment in addition to a violation of his right to equal protection of the laws, see *Yick Wo v. Hopkins*, 188 U.S. 356 (1886). This case does not directly present how Fourth Amendment principles should be applied to a determination of whether a malicious prosecution is a constitutional violation redressable by §1983 as the bank did not expressly preserve that issue below.

Nevertheless, Petitioner assumes that there would be no violation either for a public or private party unless the prosecution was instituted under circumstances where no reasonable person could have thought probable cause to believe a crime

Edmonson v. Leesville, supra, 114 L.Ed.2d at 674, that private party has "relie[d] on governmental assistance and benefits", secured the "perform[ance] [of] a traditional governmental function", and caused an injury "in a unique way by the incidents of governmental authority". To insulate that private inducing of an abuse of governmental power serves no legitimate or rational policy purpose under §1983. See *Wyatt v. Cole, supra.* In *Malley v. Briggs,* 475 U.S. 335, 343-344 (1986), the Court held that where a police officer secured the issuance of a warrant from a magistrate on the basis of information where no reasonably competent officer could have believed probable cause existed, the officer was liable in damages. Judge Posner, writing for the Seventh Circuit in *Jones v. City of Chicago,* 856 F.2d 985, 994 (7th Cir. 1989), said that officers should not benefit from the absolute immunity of prosecutors "whom they have defrauded".

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had been committed existed. Additionally, notwithstanding *Wyatt v. Cole, supra,* and obviating the concerns of the court of appeals, n.2, *supra,* that the private party should be free to bring information to the attention of state officials without fear of liability, Petitioner assumes the private party should be motivated, as he alleges in this case, by improper purposes.

Thus, Petitioner assumes that the private party in the §1983 malicious prosecution setting would have available to it a defense going both to the objectively reasonable presence of probable cause and the subjective absence of an improper purpose as components of a good faith type defense, though not an immunity from suit. See *Wyatt v. Cole, supra; Felix De Santana v. Velez,* 956 F.2d 16 (1st Cir. 1992); and *Wyatt v. Cole,* 994 F.2d 1113, 1120 (5th Cir. 1993), on remand from *Wyatt v. Cole, supra,* 118 L.Ed.2d 504 ("*Harlow's (v. Fitzgerald,* 457 U.S. 800 (1982)) qualified immunity standard is far more demanding than the objective components of the common law probable cause inquiry. . . . ")

The private party who, for improper purposes, willfully misrepresents and omits information thereby inducing a prosecution otherwise without probable cause against someone stands in the stead of the police officer who induces a prosecution on the basis of information no reasonably competent officer could have thought created probable cause. And, the point at which a private party through deceit induces state action brings that party within the scope of the test set forth in *Lugar* and succeeding precedents: the private party has "ma[de] extensive use of state procedures with 'the overt significant assistance of state officials.' " *Tulsa Professional Collection Services, Inc. v. Pope, supra,* 485 U.S. at 486. In such as the situation at bar, the private party has done more than just "ma[de] use of state procedures"; it has induced the use of those procedures by deceitful conduct designed to gain an advantage for itself under state law at the expense of the §1983 plaintiff.

The Seventh Circuit's decision requiring a conspiracy between the state and private actors in the foregoing circumstances, while unprecedented, is forthright. It constitutes an important policy departure from what this Court's precedents have indicated should be the criteria for determining when the actions of private party rise to the threshold of acts under color of state law for purposes of 42 U.S.C. §1983. The decision below, accordingly, presents this Court with an important opportunity to correct what appears to be an unsound approach disruptive of established private party state action doctrine before it creates more havoc than already exists in the lower courts.

B.

The Decision Below is Without Explicit Support in Any Circuit Notwithstanding Conflicting Results in the Circuits on the Important and Recurring Question as to the Test for Private Party State Action Under §1983 in a Malicious Prosecution Setting.

Prior to the Seventh Circuit's decision in this case, no circuit, as far as Petitioner can determine, had explicitly held that in order for a private party to be found liable as a state actor under 42 U.S.C. §1983 for malicious prosecution, the state officials must be found to have conspired with him in the sense of sharing the private party's unconstitutional objective. Many cases have involved allegations of conspiracy and courts have considered the sufficiency of the allegations or evidence in support of them. See for example, *Hand v. Gary*, 838 F.2d 420 (5th Cir. 1988); *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988); *Moore v. Market Place*, 754 F.2d 1336 (7th Cir. 1985); *Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991).[13]

Other courts have explicitly held that a conspiracy is not required. See for example, *Motes v. Myers*, 810 F.2d 1055, 1058-1059 (11th Cir. 1987); *Felix De Santana v. Velez*, 956 F.2d 16 (1st Cir. 1992). Some courts, however, have intimated that a conspiracy might be necessary on the basis of this Court's language in *Adickes v. S.H. Kress &*

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[13] For example, the Seventh Circuit cases relied upon by the court below purporting to require a conspiracy all involve allegations of conspiracy. The same applies to a case currently pending on certiorari in this Court, *Brummett v. Campbell*, No. 94-958, cert. denied, 63 LW 3538 (1995).

Company, supra, 398 U.S. at 152, that a private party may be held liable under §1983 if he or she is a "willful participant in joint activity with the state or its agents." See *Cinel v. Connick,* 15 F.3d 1388, 1343 (5th Cir. 1994); *Lee v. Town of Estes Park,* 820 F.2d 1112 (10th Cir. 1987).

The "joint activity" language of *Adickes* could, of course, refer to conspiracy in the sense of agreement on a private party's unconstitutional objective. But, there is no necessity that it do so. As noted, *supra,* this Court in *Lugar* explicitly held that in the state created attachment procedure, the "participation in joint activity" of *Adickes* required nothing more "than invoking the aid of state officials to take advantage of state-created . . . procedures." *Lugar, supra,* 457 U.S. at 942. *Adickes* involved an allegation of conspiracy, presumably meaning that the plaintiff was obliged to prove an agreement between the state agents and the private party on the unconstitutional objective. This Court in *Adickes* allowed the plaintiff to survive summary judgment in that the sequence of events could have permitted the jury to infer the necessary agreement. *Adickes, supra,* 398 U.S. at 156-157, reaffirmed in *Celotex v. Catrett,* 477 U.S. 317, 325 (1986).

The Eleventh Circuit in *Motes v. Myers, supra,* 810 F.2d at 1059, applied *Lugar's* language to a false arrest-malicious prosecution setting to hold that state action can exist "on the ex parte application of one party to a private dispute," quoting *Lugar, supra,* 457 U.S. at 942. If anything, any requirement of conspiracy in the sense of agreement on the unconstitutional objective between the private and public actors has dissipated in the wake of decisions of this Court subsequent to *Lugar, supra,* such as

Tulsa Professional Collection Services, Inc. v. Pope, supra; West v. Atkins, supra; Edmonson v. Leesville, supra; and *Wyatt v. Cole, supra.*

Nevertheless, the "joint activity" language of *Adickes, supra,* together with the Seventh Circuit's decision in this case are likely to create more disarray than already exists among the lower courts. Because this is an area of frequent litigation, the lower courts are bound to arrive at conflicting conclusions to an extent greater than they have already done so.

But, the lower court's requirement that a conspiracy is necessary in order for a private party to act under color of state law in a malicious prosecution setting is straightforward. It presents a useful framework for analysis. This case is, therefore, well suited to enable this Court to provide meaningful guidance and to correct any misreading of the "joint activity" language in *Adickes v. S.H. Kress & Company, supra,* such as found in *Cinel, supra.*

C.

The Decision Below is in Direct Conflict With the Private Party State Action Jurisprudence of the New York Court of Appeals.

Construing this Court's precedents,[14] the New York Court of Appeals in *People v. Acme Markets, Inc.,* 372

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[14] *Cameron v. Johnson,* 390 U.S. 611 (1968); *Oyler v. Boles,* 368 U.S. 448 (1962); *Two Guys v. McGinley,* 366 U.S. 582 (1961); *Edelman v. California,* 344 U.S. 357 (1953); *Ah Sin v. Wittman,* 198 U.S. 500 (1905); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Snowden v. Hughes,* 321 U.S. 1, 8 (1944).

N.Y.S.2d 590, 593 (N.Y. Ct. App. 1975), held that when prosecuting officials "at the instance of a private party . . . pursued [a criminal prosecution] through the courts . . . , the power and prestige of [the prosecutor's] office was lent to the [private parties'] campaign and . . . the [private parties'] actions became those of the state for purposes of bringing the equal protection guarantee into play." That is the situation which the summary judgment record recited by the court of appeals in this case showed.

The bank instigated the prosecution of the plaintiff in order to cause the public perception of liability for the bank's default under Illinois law to be borne by the plaintiff and to, in fact, cause the plaintiff to bear ultimate liability for the bank's default. Whether in agreement with that objective or not, by prosecuting the plaintiff as a result of misrepresentations and omissions by the bank officials, the prosecutor lent "the power and prestige of his office" "to the [bank's] campaign." *People v. Acme Markets, supra,* 372 N.Y.S.2d at 593. That, under the decision of the New York court of appeals in *People v. Acme, supra,* constituted state action without any necessity of conspiracy. See also *303 W. 42nd St. Corp. v. Klein,* 416 N.Y.S.2d 219, 223 (N.Y. Ct. App. 1979).

D.

The Seventh Circuit Has Decided an Important Question of Federal Law Which Has Not Been Settled By This Court, Will Certainly Recur, and, Therefore, Should be Settled By This Court.

With its decision in *Albright v Oliver, supra,* 127 L.Ed.2d at 121 n.4, this Court resolved the " 'embarrassing diversity' " among the circuits by holding that whether malicious prosecution stated a cause of action under §1983 was a question which had to be analyzed under the Fourth Amendment.[15] However, in the wake of the Seventh Circuit's decision in this case, there now exists in the circuits confusion as to when in a malicious prosecution setting the actions of a private party vis-a-vis the state officials will constitute action under color of state law for purposes of §1983.

The decision of the court below requiring that there be a conspiracy between the private actor and the state officials is in direct conflict with this Court's line of decisions beginning with *Lugar v. Edmondson Oil Company, supra,* and the precedents which have relied on it. Part of the confusion, as in *Cinel v. Connick, supra,* may derive from the "participation in joint activity" language from this Court's decision in *Adickes v. S.H. Kress and*

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[15] Most of the circuits had recognized malicious prosecution as a variant of substantive due process under "standards . . . [which] escape[d] easy classification." *Albright v. Oliver, supra,* 127 L.Ed.2d at 121 n.4. In light of its holding that whether malicious prosecution stated a cause of action had to be analyzed under the Fourth Amendment, this Court said, "it is evident that substantive due process may not furnish the constitutional peg on which to hang such a 'tort'." *Id.* at 122 n.4.

Company, supra. Nevertheless, in light of *Lugar* and its progeny, it seems clear that the "joint activity" language of *Adickes* does not necessarily connote a conspiracy in the sense of an agreement between the public and private parties on the private party's unlawful objective.

Private parties are frequently implicated in §1983 actions attacking the constitutional propriety of state prosecutions. That frequency portends that the issues presented in this case are ones which will recur in the future. When they do recur, unless this Court has provided guidance, they will, particularly in view of the lower court's opinion in this case, spawn a diversity of conflicting judicial approaches. Whether, and if so, the extent to which victims of an objectively unreasonable prosecution induced through the deceit of private parties have a §1983 cause of action will depend upon geography. That is an inappropriate criterion. The issues presented in this petition are, therefore, ripe for and merit this Court's consideration and resolution.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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APPEPNDIX A

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 94-1813

JERALD DAVIS,

Plaintiff-Appellant,

v.

UNION NATIONAL BANK and
WILLIAM OWENS, INDIVIDUALLY,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 90-1067 – **Michael M. Mihm,** *Chief Judge.*

ARGUED OCTOBER 5, 1994 – DECIDED DECEMBER 28, 1994

Before POSNER, *Chief Judge,* and ENGEL* and EASTERBROOK, *Circuit Judges.*

ENGEL, *Circuit Judge.* The sole issue in this appeal is whether plaintiffs must plead a conspiracy between private and state actors to state a cause of action for malicious prosecution against private parties under 42 U.S.C. § 1983. This Circuit has in the past uniformly required such a pleading, and because we find this requirement

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* Honorable Albert J. Engel, of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

supported by reason as well as precedent, we affirm the dismissal of plaintiff's case for failure to plead a conspiracy.

The plaintiff in this case, Jerald Davis, was an insurance agent responsible for securing coverage offered by the Union National Bank ("Bank") to its loan customers. In 1985, the Bank discovered thirteen instances of customers paying premiums, but never receiving insurance. The Bank contacted the Illinois state's attorney and informed him that Davis may have committed theft of the premiums. Davis was convicted of theft in a jury trial in 1988. The Illinois appellate court then held that his actions did not constitute any crime, but at most breached his contractual relationship with the Bank. *People v. Davis*, 189 Ill. App. 3d 815 (3d Dist. 1989).

Davis then brought this action in federal court for malicious prosecution against the Bank and against Illinois criminal investigator William Owens. Davis alleges that the Bank was responsible for the missing insurance and that the Bank set in motion his criminal prosecution in order to shift to Davis both the public perception of liability and, potentially, the actual legal liability for the insurance. The District Court dismissed the claim against Owens on grounds of qualified immunity, and this court affirmed. The District Court then granted the Bank's motion for summary judgment, and Davis appealed.

Section 1983 provides a cause of action for individuals whose constitutional rights are denied to them "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. To state a § 1983 claim against a private actor, plaintiffs must show

that the defendant invoked state authority in such a way that the defendant should be considered a state actor. Davis disputes the District Court's ruling that in a cause of action for malicious prosecution under § 1983, Davis must come forward with evidence from which a jury could infer a conspiracy between the private Bank and state officials. Davis argues that this court's precedents finding a conspiracy necessary are inconsistent with Supreme Court cases in which plaintiffs recovered under § 1983 without pleading or proving a conspiracy. Unfortunately, Davis overlooks the Supreme Court's own acknowledgement that the test for state action under § 1983 will vary by factual context:

> Action by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a "state actor." . . . [T]hat "something more" which would convert the private party into a state actor might vary with the circumstances. . . . [T]he Court has articulated a number of different factors or tests in different contexts: *e.g.*, the "public function" test, see *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); the "state compulsion" test, see *Adickes v. S.H. Kress & Co.*, 398 U.S., at 170; the "nexus" test, see *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); and, in the case of prejudgment attachments, a "joint action test," *Flagg Brothers*, 436 U.S., at 157.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1981).

While the Supreme Court has not established a test for finding state action in a malicious prosecution case,

this court has. *See Gramenos v. Jewel Co., Inc.*, 797 F.2d 432 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028, 107 S.Ct. 1952, 95 L.Ed.2d 525 (1987); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985); *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323, 326-27 (7th Cir. 1978), *cert. denied*, 444 U.S. 841, 100 S.Ct. 82, 62 L.Ed.2d 53 (1979); *see also Arnold v. International Business Machines*, 637 F.2d 1350 (9th Cir. 1981). In *Gramenos*, we explained: "Although private parties call on the aid of state law 'without the grounds to do so', when the private decision may 'in no way be attributed to a state rule or a state decision' . . . , the private parties are not state actors. . . . [If a complainant] is operating independently, his conduct is judged under the state tort law (false arrest, malicious prosecution, slander, and the like) rather than the fourth amendment." 797 F.2d at 435-36. Prosecution inevitably involves the state, but not every tort action for malicious prosecution states a claim under § 1983. The private actor must wrongfully influence the state's decision to prosecute through a conspiracy, or else the plaintiff must seek his remedy in a state tort claim, not a federal § 1983 suit.

Davis, in attempting to allege a conspiracy, notes that one of the state officials eventually applied for and received a loan from the Bank. One isolated transaction in the ordinary course of business, standing alone, does not offer sufficient evidence for a jury to infer the existence of a conspiracy. At most, the facts Davis alleges could be taken to suggest that the Bank gave the officers misleading or false information, but such behavior does not indicate wrongful state action.

We hold, once again, that plaintiffs must plead and offer sufficient evidence to support a conspiracy between

private and public actors in order to state a claim under § 1983 against the private party for malicious prosecution. Because Davis has failed to offer any evidence suggestive of a conspiracy, the district court's judgment of dismissal is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JERALD DAVIS, Plaintiff, v. UNION NATIONAL BANK, a national banking association and the successor in interest to the First National Bank of Macomb, a wholly owned subsidiary of Union National Bank, THE FIRST NATIONAL BANK OF MACOMB, a corporation, and predecessor in interest to the Union National Bank, and WILLIAM OWENS, individually. Defendants.	)	Case No. 90-1067 (Filed March 18, 1994)

ORDER

Pending before this Court is Defendant Union National Bank's Motion for Summary Judgment as to Counts 1, 2, and 5. For the reasons set forth below, the Motion is Granted in relation to Counts 1 and 2 (§ 1983 claims). The Court dismisses Count 5 (pendent claim of malicious prosecution) pursuant to 28 U.S.C. § 1367 for lack of supplemental jurisdiction.

STATEMENT OF THE FACTS

Plaintiff Jerald Davis obtained an insurance broker's license conferred by the Illinois Department of Insurance

in 1975. Subsequently, Davis entered into a contractual relationship with the First National Bank of Macomb [First National]. First National is a wholly owned subsidiary of Defendant Union National Bank of Macomb [Union National]. Pursuant to the contract, Davis procured credit life insurance policies in connection with First National's consumer loans.

First National offered credit life insurance to its loan customers at the inception of making a loan. First National would add the premium for the credit life insurance to the principal amount of the loan. One third of the premium amount remained with First National, and two thirds was deposited into Davis's escrow account for the purpose of actually procuring the credit life insurance. Davis would then forward the net premium amount along with a policy application to an insurance company for policy issuance.

In some cases an entity such as a car dealership initiated the sale of credit life through a retail installment contract. The entity would sell the installment contract to First National with recourse back against the entity. First National would then issue a money order payable to the entity for the premiums and forward the necessary information concerning the borrower and the terms of the loan to Davis. The entity would then pay Davis the premium less the entity's commission. Following all of this, Davis would procure the credit life insurance policy.

Between 1981 and 1985, First National deposited money into Davis's bank account for purposes of procuring credit life insurance coverage for thirteen loan customers. It is undisputed that Davis failed to procure the

insurance. Davis asserts that First National deposited some of the money into the wrong account. Union National alleges that Davis used some of the money for personal matters.

First National discovered that credit life insurance had not been procured by Davis for the thirteen loan customers. This caused officials from First National to meet with the McDonough County State's Attorney, John Clerkin, and the Assistant State's Attorney, William Poncin. Subsequently, Illinois Department of Criminal Investigation Agent William Owens began an investigation. On August 8, 1986, a criminal information was drafted charging Davis with 13 counts of theft. On August 19, 1986, a warrant was issued for Davis's arrest. On February 2, 1988, a jury found Davis guilty of four counts of theft.

Davis appealed, and the Illinois Appellate Court reversed his conviction. The Appellate Court reasoned that if Davis failed to procure credit life insurance his failure constituted a breach of contract, not a criminal offense. *People v. Davis*, 189 Ill. App.3d 815 (3rd Dist. 1989). On January 31, 1990, the Illinois Supreme Court denied leave to appeal.

Davis originally filed this action on March 1, 1990, alleging eight counts against Defendants Union National and Owens. On September 10, 1990, Davis filed a Second Amended Complaint alleging the previous eight counts and two additional state law counts against Owens. The Second Amended Complaint included the following counts:

I. Conspiracy to violate Davis's constitutional rights claim against Union National and Owens.

II. Section 1983 malicious prosecution claim against Union National.

III. Section 1983 malicious prosecution claims against Owens.

IV. *Bivens* claim against Union National for violation of constitutional rights under color of federal law.

V. Common law malicious prosecution claim against Union National.

VI. Common law malicious prosecution claim against Owens.

VII. Common law false arrest claim against Union National.

VIII. Common law false arrest claim against Owens.

IX. Common law defamation claim against Union National.

X. Common law false light claim against Union National.

On July 9, 1991, this Court dismissed Counts 6 through 10 of the Second Amended Complaint, but denied the Defendants' motions for dismissal regarding Counts 1 through 5. On July 15, 1991, Owens appealed.

On November 7, 1991, with leave of Magistrate Judge Robert J. Kauffman, Davis filed a Third Amended Complaint alleging the same ten counts alleged in the Second Amended Complaint. The Third Amended Complaint

indicates, however, that Davis dismissed Count 4 with prejudice. In his Motion for Leave to File, Davis acknowledged that Counts 6 through 10 had already been dismissed by the Court, but nevertheless included those counts for purposes of preserving any rights. On November 14, 1991, Union National answered Counts 1, 2, and 5 of the Third Amended Complaint, the only remaining counts naming it as a defendant. On January 8, 1993, this Court dismissed Owens and Count 3 from the case pursuant to a Seventh Circuit mandate.

In Counts 1 and 2, Davis alleges that, in violation of § 1983, Defendant Union National conspired with state officials, William Owens and William Poncin, to maliciously prosecute Davis and deprive him of his constitutional rights. Count 5 alleges a pendent malicious prosecution claim under Illinois common law. Union National, successor in interest to First National, now moves this Court for summary judgment regarding Counts 1, 2, and 5 of the Third Amended Complaint.

DISCUSSION

On a motion for summary judgment, the district court must determine "whether the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Colan v. Cutler-Hammer, Inc.*, 812 F.2d 357, 360 (7th Cir.) (per curiam), *cert. denied*, 484 U.S. 820, 108 S.Ct. 79 (1987), *quoted in Wolf v. City of Fitchburg*, 870 F.2d 1327, 1329 (7th Cir. 1989). The moving party has the burden of establishing the lack of such an issue.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986).

Once the movant has made a properly supported motion, the non-movant has the responsibility of going beyond the pleading and setting forth specific facts demonstrating the existence of a genuine issue of material fact for trial. *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 567 (7th Cir. 1989); *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024, 1031-32 (7th Cir.), *cert. denied*, 488 U.S. 909, 109 S.Ct. 261 (1988). *See Celotex*, 477 U.S. at 325. A material fact must be "outcome determinative under the governing law." *Shlav v. Montgomery*, 802 F.2d 918, 920 (7th Cir. 1986) *quoting Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983). The fact is genuinely disputed when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986), *quoted in Mays v. Chicago Sun-Times*, 865 F.2d 134, 136 (7th Cir.), *cert. denied sub nom. Platt v. U.S. Court of Appeals for the Seventh Circuit, et al.*, 493 U.S. 900, 110 S.Ct. 259 (1989). Thus, the non-movant must produce proper documentary evidence to support his contentions. *Howland v. Kilquist*, 833 F.2d 639, 642 (7th Cir. 1987).

UNDER COLOR OF STATE LAW

Defendant Union National argues that it did not act under color of state law for purposes of sustaining a § 1983 cause of action. 42 U.S.C. § 1983.

Section 1983 does not provide a remedy for all actions resulting in constitutional deprivations. *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 1112 (1983). To sustain a § 1983 claim, the conduct complained of must occur "under color of" state law. *Tower v. Glover*, 467 U.S. 914, 104 S.Ct. 2820, 2824 (1984); *Briscoe*, 103 S.Ct. at 1112-13. Private actors may be found to act under color of state law and liable under a § 1983 cause of action in situations where a private actor is a "willful participant in joint action with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183 (1980); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352 (7th Cir. 1985).

In *Moore*, the plaintiffs brought a § 1983 cause of action against a restaurant after the plaintiff was arrested on charges of theft. The Seventh Circuit in *Moore* stated that "[i]n order to sustain a § 1983 action against a private individual, there must be some evidence of some concerted effort or plan between the private party . . . and the state officials. . . . " *Moore*, 754 F.2d at 1352-53. The Court in *Moore* held that a private party that provides false information to an arresting officer will not be liable under § 1983. *Moore*, 754 F.2d at 1352.

Similarly, in *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 435 (7th Cir. 1986), the Seventh Circuit held that, for a private party to be state actor, there must be "an agreement on a joint course of action in which the private party and the state have a common goal." In *Gramenos*,

the plaintiff brought a § 1983 action against a store, the store's security guards, the arresting officers, and others after he was arrested and acquitted of shoplifting. The Seventh Circuit based its decision on three items of evidence: (1) the store printed the complaint; (2) the store gave its security guards full discretion with respect to arresting shoplifters; and (3) the police officer stated that "if the [store] wanted the individual arrested, we would arrest him." *Gramenos*, 797 F.2d at 436. The Seventh Circuit held that the evidence of conspiracy in *Gramenos* was weaker than the evidence proffered in the *Moore* case, and therefore insufficient to withstand summary judgment. *Gramenos*, 797 F.2d at 436. The *Gramenos* Court reasoned that, where there is no evidence of an agreement and where a private party acts independently, the private party's conduct comes under state tort law and not § 1983 for constitutional violations. *Gramenos*, 797 F.2d at 435-36.

To establish liability under the "joint action" theory in a § 1983 action against a private actor, the plaintiff must come forward with evidence showing that the "public and private actors share a common, unconstitutional goal." *Cummingham v. Southlake Center for Mental Health, Inc.*, 924 F.2d 106, 107 (7th Cir. 1991). In *Cummingham*, a jail counselor brought a § 1983 action against his employer (a private contractor to provide mental health services for a jail), the employer's president, the jail, and the warden claiming a violation of the plaintiff's First Amendment rights. In its opinion, the Seventh Circuit quoted the *Moore* case for the proposition the "[i]n order to establish a conspiracy, the plaintiff must demonstrate that the state officials and the private actor somehow reached an understanding to deny the plaintiffs their

constitutional rights." *Cunningham,* 924 F.2d at 107, *quoting, Moore,* 754 F.2d at 1352. The *Cunningham* Court also quoted *Fonda v. Gray,* 707 F.2d 435 (9th Cir. 1983) for the proposition that "[t]o prove conspiracy between private parties and the government under § 1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown." *Cunningham,* 924 F.2d at 107, *quoting, Fonda,* 707 F.2d at 438. In summary, the plaintiff "must prove that each of the joint actors was in some part motivated by this unconstitutional purpose." *Cunningham,* 924 F.2d at 108. *See also, Johnson v. Miller,* 680 F.2d 39 (7th Cir. 1982) (a bank filing a criminal complaint with the police is an act of a private citizen and failure to withdraw the complaint after discovering a mistake does not change the private nature of the bank's actions).

Davis argues that Union National, the McDonough County State's Attorney's Office, and the Illinois Department of Investigation acted jointly to falsely prosecute him. In support, Davis points to December 17, 1985, when Kenneth Myers (President of Union National), G. Davis Carson (Senior Vice President of Union National), and Kwacala (Union National's lawyer) met with McDonough County State's Attorney John Clerkin and Assistant State's Attorney William Poncin. At that meeting the bank officials advised the State's Attorney's Office that money had been deposited in Davis's account, that Davis failed to procure credit life policies, and that money had been drawn from the account by Davis. Davis asserts that the bank officials deliberately failed to inform the state's Attorney's Office that Davis was not notified about nor given information necessary for procuring credit life insurance for the thirteen people and that the money was

placed in Davis's demand account, not the insurance escrow account.

After the December 17, 1985 meeting, Poncin and Illinois Department of Criminal Investigation Agent William Owens were assigned to the case. Owens conducted an investigation starting in January 1986. In August 1986, Owens completed an investigation report resulting in the criminal charges being brought against Davis. Davis directs the Court to the deposition statements of Poncin and Owens supporting the proposition that, had they known that Davis was not notified to procure the relevant credit life policies and known that certain monies were deposited in the wrong bank account, they may have reached a different conclusion concerning Davis's prosecution.

In addition, Davis points to the fact that during the ensuing investigation of Davis the McDonough County State's Attorney's Office and the Department of Criminal Investigation met several times with bank officials. Davis also directs the Court to the fact that Poncin met with bank officials prior to trial concerning the trial and following the conviction, but prior to sentencing, concerning restitution.

In order to present a § 1983 claim against a private actor, the plaintiff must present evidence of some concerted effort or plan between the state actors and the private actors. *Moore*, 754 F.2d at 1273. To withstand a summary judgment motion, Davis must come forward with evidence of joint participation between Union National and the state officials. *See, Gramenos*, 797 F.2d at 735-36. This case is not at the dismissal motion stage

under Rule 12(b)(6). This action was initially filed on March 1, 1990, and ample discovery has been completed for Davis to come forward with whatever evidence exists on this issue. Conclusory allegations, unsupported by facts, that private torts were committed in concert with state officials does not meet the under color of state law requirement of a § 1983 action against a private party. *Grow v. Fisher*, 523 F.2d 875, 879 (7th Cir. 1975); *see also, Moore*, 754 F.2d at 1352, *citing, Tarkowski v. Robert Bartlett Realty*, 644 F.2d 1204, 1206 (7th Cir. 1980) (while circumstantial evidence may demonstrate a conspiracy between a private party and state officials, "mere allegations of a conspiracy are insufficient to withstand a motion to dismiss").

This Court finds that Davis has failed to meet his burden of coming forward with evidence to show joint participation between the private actors and the state actors in this case. The filing of a criminal complaint is an act of a private citizen. The act of meeting with investigators and prosecutors during the investigation, prior to putting on evidence at trial, and prior to sentencing does not change the private nature of Union National's conduct. There is no evidence here to support a finding that the State's Attorney's Office or the Department of Criminal Investigation conspired with or acted jointly with the private actors in making the determination to prosecute Davis. Davis proffers no evidence that bank officials had any control over the prosecution of this case. In fact, Poncin and Owens stated that they were not improperly influenced in the investigation or in making the decision to prosecute. The depositions of Clerkin, Poncin, Owens,

and others indicate only that bank officials provided factual information. With respect to the meetings, Poncin stated that he had no more contact with these bank officials than with any other criminal complainant.

If the private actors willfully withheld relevant information from Poncin and Owens, as Davis suggests, this evidence does not bring the conduct of the private actors under color of state law. Davis may have a state tort action against the private actors, but unless the state actors and private actors willfully and jointly participate, the conduct of the private actors does occur under color of state law.

Private persons who provide information, file complaints, or testify in an action which is prosecuted under color of state law are not joint participants or conspirators in a state action. *See generally, Gramenos; Tarkowski;* and *Grow.* If this Court were to follow Davis's argument here, potentially every private person involved in criminal matters could be sued under § 1983.

PROBABLE CAUSE

Next, Union National argues that the existence of probable cause bars Davis's malicious prosecution claim under § 1983, Count 2.

Having held that Union National did not act under color of state law for purposes of liability under § 1983, this Court finds it imprudent to make a finding on this issue. Because Union National did not act under color of sate law, the issue of probable cause becomes moot with respect to Union National in the context of a § 1983 claim.

SUPPLEMENTAL JURISDICTION

All of Davis's claims giving this Court original jurisdiction have been dismissed form this case. Therefore, the Court dismisses the only remaining pendent claim, Count 5, to this litigation for want of supplemental jurisdiction. *Wentzka v. Gellman*, 991 F.2d 423 (7th Cir. 1993). The Court admonishes Davis of 735 ILCS 5/13-217 and 28 U.S.C. § 1367(d) setting forth specific limitations period for raising the claim following dismissal by this Court on jurisdictional grounds.

CONCLUSION

For the reasons set forth above, the Defendants' Motion for Summary Judgment is Granted in relation to County 1 and 2 (§ 1983 claims). The Court dismisses Count 5 (pendent claim of malicious prosecution) for lack of supplemental jurisdiction. This Case is Terminated. Each party to bear their own costs.

ENTERED this 18th day of March, 1994.

/s/ Michael M. Mihm
Michael M. Mihm
Chief United States
District Judge

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: December 28, 1994

BEFORE: **Honorable** Richard A. Posner, Chief Judge

Honorable Albert J. Engel, Circuit Judge*

Honorable Frank H. Easterbrook, Circuit Judge

No. 94-1813

JERALD DAVIS,
Plaintiff - Appellant

v.

UNION NATIONAL BANK, a national banking association and the successor in interest to the First National Bank of Macomb, a wholly owned subsidiary of Union National Bank, FIRST NATIONAL BANK OF MACOMB, and predecessor in interest to the Union National Bank and WILLIAM OWENS,
Defendants - Appellees

Appeal from the United States District Court for the Central District of Illinois, Peoria Division No. 90 C 1067, Michael M. Mihm, Chief Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

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* The Honorable Albert J. Engel, of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

APPENDIX D

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee, v. JERALD DAVIS,
Defendant-Appellant.

third district No. 3-88-0468

Judgment reversed.

Opinion filed September 27, 1989. – Rehearing denied November 7, 1989.

1. CONTRACTS – *fiduciary relationship was established through bank's solicitation of insurance.* Where bank and retailer engaged in solicitation of credit life insurance in connection with loans and sales by retailer, a fiduciary relationship was established between themselves and the prospective customers, and the bank and the retailer were therefore obligated to see that insurance was procured, and in the event insurance was not issued when requested, they had an obligation to refund any unearned premium or credit the customer's account.

2. CRIMINAL LAW – *defendant's conduct constituted breach of contract, not theft.* In a theft prosecution arising from a series of transactions in which the defendant, a licensed insurance producer, became obligated to obtain credit life insurance for the customers of a retailer which used a bank to provide customers with loans to purchase the retailer's product, the circumstances of the defendant's failure to obtain the requested insurance constituted a breach of his contractual obligations to the retailer and the bank, but did not provide a basis for a prosecution for theft, and therefore the defendant's convictions were reversed.

Appeal from the Circuit Court of McDonough County; the Hon. Stephen G. Evans, Judge, presiding.

Law Offices of John H. Bisbee, of Macomb (John H. Bisbee, of counsel), for appellant.

William Poncin, State's Attorney, of Macomb (Judith Z. Kelly, of Sate's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

JUSTICE SCOTT delivered the opinion of the court:

Defendant Jerald Davis appeals from the judgment entered by the circuit court of McDonough County followed jury verdicts of guilty on four counts of theft as defined in section 16-1(a)(1) of the Criminal Code of 1961 (Ill. Rev. Stat. 1987, ch. 38, par. 16-1(a)(1)). Davis was sentenced to 30 months' probation 30 days' periodic imprisonment in the McDonough County jail, and ordered to pay restitution in the amount of $3,088.16.

Davis, a licensed insurance producer, was engaged in the practice of writing credit life and/or disability insurance policies insuring loan customers of the First National Bank of Macomb. The bank was primary beneficiary of the policies, and the policies were financed by adding the premium to the sum borrowed. Commissions were paid either to the bank when it initiated the sale of the policies, or to other entities, *e.g.*, a retailer whose installment contracts were sold to the bank and provided for purchase of a policy, when they initiated the sale.

The record reveals if a borrower agreed to purchase a policy at the bank's initiation, the bank calculated the premium and added it to the loan balance. The premium, minus the bank's commission, then would be deposited

into Davis' escrow accounts when the loan proceeds were disbursed. Davis' escrow accounts were maintained at the bank, and its officers would deposit the premium directly into his account. Information needed to issue the policy, *e.g.*, borrower's name, address, age, and terms of the loan, would be provided by Davis and he would forward the net premium and policy application to the insurance company for policy issuance.

If another entity initiated the sale of a policy through its retail installment contract, the bank would issue a money order payable to the entity for the premium at the time the bank purchased the contract. The entity then would pay Davis the premium minus its commission. In the latter instance, the record is unclear as to whether the entity or the bank assumed responsibility for providing Davis with information concerning the borrower and loan required to obtain issuance of a policy.

In an effort to collect an indebtedness Davis owed the bank on a delinquent real estate loan, the bank applied a set off against his insurance escrow accounts closing the accounts in their entirety in the late summer of 1985. Following discovery, in May of 1985, that certain borrowers' credit insurance policies had not been issued, the bank reported the matter to the McDonough County State's Attorney's office for criminal prosecution. The bank, however, did not demand that Davis cover the losses it incurred, *e.g.*, refund of unearned premium, cost of obtaining new policies, payment of death claim, etc., following its discovery of the nonissuance of certain policies.

On August 5, 1986, Davis was charged with 13 counts of theft in violation of section 16-1(a)(1) of the Criminal Code of 1961 – "Theft" (Ill. Rev. Stat. 1987, ch. 38, par. 16-1(a)(1)) – and 13 counts of breach of fiduciaary duty in violation of section 508.1 of the Illinois Insurance Code – "Fiduciary Duties" (Ill. Rev. Stat. 1987, ch. 73 par. 1065.55-1) – stemming from his failure to procure insurance policies for certain loan customers after premium deposits were made either directly to his escrow account by the bank, or deposited by him from funds received from other entities. All counts of breach of fiduciary duty and all but five counts of theft were dismissed prior to trial.

At Davis' arraignment and in response to his motion for disclosure pursuant to Supreme Court Rule 412, "Disclosure to Accused" (107 Ill. 2d R. 412), pretrial discovery order was entered for both Davis and the prosecution. Davis objected to the order granting discovery to the prosecution on grounds the People's oral motion for discovery did not comply with Supreme Court Rule 413(d), "Disclosure to Prosecution – Defenses" (107 Ill. 2d R. 413(d)), requiring a written motion. During a protracted motion practice wherein the People continuously moved for compliance with the entered order and with Davis objecting to the same, Davis supplemented his refusal to comply on grounds the order granting the People discovery violated his rights under the fifth, sixth, and fourteenth amendments of the United States Constitution (U.S. Const., amends. V, VI, XIV), article I, sections 2, 8 and 10, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, §§2, 8, 10), and section 3-1 of the Criminal Code of 1961 – "Presumption of Innocence and proof of

Guilt" (Ill. Rev. Stat. 1987, ch. 38, par. 3-1). He further cited the pending decision of *Taylor v. Illinois* (1988), 484 U.S. 400, 98 L. Ed. 2d 798, 108 S. Ct. 646, which when entered, would define the power of Illinois courts to impose sanctions for failure to comply with State discovery procedures pursuant to Supreme Court Rule 415(g), "Regulation of Discovery – Sanctions" (107 Ill. 2d R. 415(g)), as a rationale for his continuing noncompliance. Davis, however did inform the People and trial court he intended to advance no affirmative defense to the charges and that he would not call witnesses whose testimony would be outside the scope of the People's burden of going forward and proof.

On January 22, 1988, the trial court ordered Davis to comply on or before January 25 with the order entered at the arraignment or suffer exclusion of any evidence subject to disclosure under the terms of the order. he thereafter filed a motion for reconsideration or continuance and set the motion for hearing on January 28. Upon learning of the decision entered in *Taylor v. Illinois* (1988), 484 U.S. 400, 98 L. Ed. 2d 798, 108 S. Ct. 646, permitting exclusion of defense witnesses for violation of discovery orders, Davis informed the People on January 27 he would comply with the discovery order. In response thereto, the people filed a motion *in limine* requesting, *inter alia*, that Davis be precluded from presenting testimony from witnesses not disclosed by January 25.

At hearing on both motions, Davis submitted a list of character witnesses and advised the trial court the witnesses would testify only as to his reputation and honesty in business affairs. The trial court denied Davis' motion

for reconsideration or continuance and granted the People's motion *in limine*. No showing of prejudice resulting from Davis' failure to comply was made by the People and the record reveals that following the hearing the People interviewed at least one rebuttal character witness.

A jury trial was held in February 1988 on the remaining five counts of theft, with the court directing a verdict in favor of Davis on one count at the close of the People's case in chief. Following Davis' testimony, the defense rested. Davis' motion for a directed verdict was denied, and the jury returned verdicts of guilty on the remaining four counts. Two counts stemmed from Davis' failure to procure insurance on borrowers, whose premiums were directly deposited into his escrow account by a bank officer, with two counts stemming from his failure to procure insurance on borrowers after he deposited premiums received from a local dealership, Happy Camping of Macomb, Illinois, following its sale of retail installment contracts to the bank. Following denial of Davis' post-trial motion for entry of judgment notwithstanding verdict, or in the alternative, for a new trial or in arrest of judgment, judgment was entered on the verdicts.

On appeal, Davis requests this court reverse his conviction and remand for a new trial based on one or more of the following contentions. First, that the trial court's sanction denying him the right to call character witnesses for failure to comply in a timely manner with court ordered discovery infringed his rights guaranteed under the compulsory process clause of the sixth and fourteenth

amendments to the United States Constitution and corresponding provisions of the Illinois Constitution, and violated his right of due process under the Fourteenth amendment to the United States Constitution. Second, given names of his character witnesses were disclosed to the People four days prior to trial and no showing of prejudice was made by his failure to disclose the names earlier, the sanction was improperly imposed. Third, given the People and trial court were advised his defense would be negative, the discovery order requiring disclosure of witnesses and the ensuing sanction was an infringement upon his presumption of innocence guaranteed by the due process clause of the fourteenth amendment to the United States Constitution, the corresponding provisions of the Illinois Constitution, and section 3-1 of the Criminal Code of 1961. Fourth, substance of testimony given at trial by three prosecution witnesses concerning three contested and critical issues of fact concerning his knowledge that insurance was requested or that he had sufficient information to procure policies was not disclosed pursuant to Supreme Court Rule 412 resulting in surprise and prejudice to Davis. Fifth, he was denied the effective assistance of counsel, when his counsel failed to provide the People with names of character witnesses in a timely manner resulting in the trial court's imposition of the sanction excluding the witnesses.

In the alternative, Davis requests this court vacate the trial court's judgment and discharge him on the grounds that (1) the evidence adduced at trial proved only the breach of an obligor-obligee duty and not theft as defined by section 16-1(a) of the Criminal Code of 1961, or (2), as a matter of law, the evidence adduced was

not sufficient to establish beyond a reasonable doubt the elements of the crime of theft.

As the evidence adduced at trial revealed only the following, it is not necessary to consider Davis' contentions concerning the trial court's imposition of the sanction of witness exclusion, infringement on presumption of innocence when a discovery order requires disclosure beyond revelation that an accused's defense is strictly negative, the People's compliance with the letter and intent of mandated disclosure to the accused, or the issue of effective assistance of counsel.

The evidence showed that on two occasions a bank officer solicited insurance, collected the premium and deposited it into Davis' escrow accounts, and thereafter failed to forward Davis information required to obtain policy issuance. Further, on two occasions involving the bank's purchase of Happy Camping's retail installment contracts, which included a request for insurance, Davis accepted the premium from Happy Camping and deposited it into his escrow accounts. In the latter two instances, he did not receive any information from the bank concerning the borrower or loan terms, nor did he receive a copy of the loan contract from Happy Camping containing this information on one transaction, whereas it was disputed he may have received a contract on the other transaction. No evidence was presented that the premiums deposited were withdrawn by Davis, and the premiums apparently remained in the accounts until the bank closed the accounts in set-off against an unrelated delinquent loan.

•1 This evidence establishes clearly that the bank and Happy Camping, through their solicitation of insurance, created a fiduciary relationship between themselves and their respective borrowers. (Ill. Rev. Stat. 1987, ch. 17, par. 2001 *et seq.*) They were obligated therefore, to ensure that insurance was procured or risk breach of their fiduciary duties. Further, in the event such insurance was not issued, they were required, *inter alia*, to refund unearned premium or credit the borrower's account. Ill. Rev. Stat. 1987, ch. 73, par. 767.58(c); ch. 121½ par. 511.

•2 In endeavoring to honor their fiduciary duty, a contractual relationship was established with Davis obligating him to procure insurance to consideration of the premiums deposited. Davis' failure to obtain the policies, whether contributed in part or whole by the bank's or Happy Camping's failure to inform Davis concerning details of the loans, is properly characterized as a breach of a contractual relationship, obligor/obligee, owing the bank and/or Happy Camping as opposed to a criminal offense of theft as defined and chargeable under section 16-1 of our criminal code. (Ill. Rev. Stat. 1987, ch. 38, par. 16-1. See also *People v. Becker* (1953), 414 Ill. 291, 111 N.E. 2d 491; *People v. Robinson* (1933), 352 Ill. 596, 186 N.E.2d 484.) Davis' clearly established failure to procure the policies may give rise to a cause of action in the bank and/or Happy Camping for breach of contract, and in the borrowers against their fiduciaries for breach of fiduciary duty. It is well settled that breach of an obigor [sic] /obligee relationship does not support a charge of theft as presented herein. *People v. Buffalo Confectionery Co.* (1980), 78 Ill. 2d 447, 401 N.E.2d 546.

Accordingly, we hold as a matter of law the evidence presented herein does not constitute theft as defined in section 16-1 of our criminal code and therefore reverse the judgment of the trial court of McDonough County and order Davis discharged.

Reversed.

HEIPLE and STOUDER, JJ., concur.